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# MENTAL DISABILITY LAW REPORTER

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Northampton resident by the deadline of January 1, 1980. Yet despite these delays, "the process of evaluation and service planning is moving shakily forward."

2. *Service Coordinator/Case Management* — Service coordinators, "who act as liaison to the community programs for persons leaving the Hospital" and who take a primary role in coordinating and reviewing ISPs, are growing in numbers.

3. *Crisis Intervention* — Following the last report of the monitor, "particular attention has been focused upon issues concerning crisis intervention." A number of unanswered legal issues are present that affect crisis care, such as licensing programs which receive involuntary clients, licensing programs to retain involuntary clients, providing appropriate security, and the type and degree of restraints which may be used. Moreover, there are general concerns about funding, inappropriate admissions, follow-up services and selection of crisis models.

4. *Human Resources* — "A limited draft plan for orientation, retraining and ongoing development of Hospital staff and employees of community programs was submitted . . . on October 15, 1979." The deadline for the final plan has long since passed. Delays have been caused most prominently by the transfer of staff from the hospital to the community.

5. *Area Management* — "Because of the increase in the number of community programs, each of the Areas [in the region has] had an increase in the demands placed upon [its] fiscal, monitoring, and program staff." This has been addressed by taking on additional staff. Once again, however, the process was delayed by problems in transferring personnel.

The report, after detailing progress in specific community programs and discussing problems and solutions in areas of particular concern, came to a number of conclusions.

The most distressing failures of the past year of implementation include the considerable delays in establishing the various components of the new system, the frustrating budgetary and other fiscal problems, the program and system failures which led to the re-institutionalization or inadequate servicing of Consent Decree clients, and the continuing insufficiency of services for specific groups such as minorities, adolescents and the elderly. Successes include the eventual establishment of supportive services — assessment teams, case management, crisis intervention and respite services — in each Area, the creation or upgrading of quality residential and day programs, and the progress in streamlining fiscal procedures. The biggest challenge for the coming fiscal year can be stated very simply: insuring *quality* treatment for clients in the community. To meet this challenge it appears that high levels of training, clinical supervision, effective personnel policies and community education will be necessary. The frustrations of the past year have sometimes clouded the optimism and enthusiasm which attended the original prom-

ulgation of the Consent Decree. Problems have sometimes seemed overwhelming. Nevertheless, the patience and sustained efforts of all parties, including the community at large, have resulted in very substantial progress in implementation. 1

§§502(e), 907

## ***Pennhurst* will be reviewed by U.S. Supreme Court; district court modifies order**

The seminal and controversial decision of the Third Circuit in *Halderman v. Pennhurst*, 612 F.2d 84 (3d Cir. 1979), 4 MDLR 14, is going to be reviewed by the U.S. Supreme Court, probably in the fall. The major issue is whether under the 1975 amendments the Developmentally Disabled Assistance and Bill Rights Act, mentally retarded persons under the custody of the state have a federal statutory right to treatment or habilitation and a right to placement in the least restrictive environment. Also, the court will determine, assuming there are such rights, whether they may be acted upon through an implied right action by an individual complainant and enforced as civil rights violation through an action brought under the Civil Rights Act, 42 U.S.C. §1983. *Halderman v. Pennhurst*, 48 U.S.L.W. 3797 (June 10, 1980).

### **Factual Background: Brief Summary**

The case was filed in 1977 as a class action on behalf of the residents of a large institution for the mentally retarded in Pennsylvania. The district court in what appeared to be a monumental decision, ruled that the conditions, programs and habilitation provided at the facility violated the due process and equal protection clauses of the Fourteenth Amendment, the Eighth Amendment, §504 of the Rehabilitation Act of 1973, and state law. It ordered that Pennhurst be phased out of existence and appropriate living arrangements be provided in the community. In addition, the court ordered individual program plans to carry out the habilitation of each of the residents in the least restrictive, most integrated setting possible and appointed a special master to oversee the implementation order. Some advocates were led to believe that this signaled the end of all large institutions. *Halderman v. Pennhurst*, 446 F. Supp. 1295 (E.D. Pa. 1977), 2 MDLR 201, 3 MDLR 238.

On appeal, the Third Circuit modified the order of the district court and, while it agreed that plaintiffs enjoyed a federal right to treatment or habilitation and a right to the least restrictive environment under the Developmental Disabilities Act, it refused to go so far as to close Pennhurst and ban all future admissions.

The Third Circuit emphasized the need to look at the individual situation of each plaintiff very carefully and then determine the appropriate placement

would be going too far to hold that all institutional placements are inappropriate, even though the assumption in most cases would be that they are. *Pennhurst, supra* (3rd Cir.).

While it is uncertain what the exact dimensions of the Developmental Disabilities Act may be in terms of its definition of rights, and also whether it may be enforced through a private right of action, the recent decision in *Maine v. Thiboutot* (4 MDLR 248) makes it clear that whatever the act may provide, it is enforceable as a federal statute under §1983 of the Civil Rights Act.

#### Changes at the District Court Level

While plaintiffs and defendants prepared for a possible Supreme Court review, the district court amended its original order in *Pennhurst* so that it would conform with the Third Circuit's decision. *Halderman v. Pennhurst*, No. 74-1345 (E.D. Pa. April 24, 1980). Much of the original orders were reissued without significant change. Perhaps the most important modifications involved the individual planning for each resident. According to the new order, the following procedures must be implemented:

1. Each resident must have an Individual Habilitation Plan (IHP). The guidelines for this planning is to be prepared by the special master and incorporated into the order by reference.

2. A hearing master has been appointed to make determinations on placements when there is disagreement about the IHP.

3. Residents will be moved into community living arrangements in a timely fashion.

4. The standards for determining an appropriate placement will include a presumption that it is preferable to place the individual into a community living arrangement. However, both alternatives must be considered and compared.

5. A county defendant shall not recommend admission to *Pennhurst* unless there has been a comprehensive written determination of the individual's situation, efforts to find an appropriate community setting, and "reasons why this is an extreme situation requiring admission to *Pennhurst*."

6. Individuals on the waiting list for *Pennhurst* must go through determinations comparable in their rigor to the standards for determining an appropriate placement for those seeking admission.

§902(e)

### Nine courts determine parental rights

In this collection of nine cases concerning the parental rights of mentally disabled parents and the proper disposition of the children, procedural matters rather than the substantive concerns were determinative in six of them. In all three cases where the court reached the substantive issues, the parents lost.

#### Circumstances Supporting Termination of Parental Rights

An alcoholic mother who had her parental rights terminated lost her appeal to the Nebraska Supreme Court. She was intoxicated three or four times a week, had been hospitalized for alcoholism three times, on several occasions had locked her children out of the apartment or left them alone overnight, had attempted suicide once and at one time had expressed a desire to have the children remain in foster care. *Nebraska v. Wedige*, 289 N.W.2d 538 (Neb. Sup. Ct. 1980).

The Montana Supreme Court has upheld the termination of parental rights of a mother confined to a mental hospital. At the time that C.M.S. was conceived (by an unknown father) and delivered, her mother was in a mental hospital following an insanity acquittal of a murder charge. The child has spent all four years of her life with the same foster family who sought to adopt her. Finding the child abused or neglected obviates the need for the consent of the natural parent for the adoption. The court judicially noticed (recognized as a fact without specific testimony) that the mother had a long history of mental problems and that her condition "is diagnosed as paranoid schizophrenia with no hope of significant improvement in the foreseeable future. . . . We believe that, under the statute, appellant's confinement is a sufficient act of omission which, by reason of physical and mental incapacity, renders appellant unable to discharge the duties and responsibilities necessary for the child's well-being." The court held that in light of all these facts, "there can be but one conclusion — the best interests of C.M.S. can only be served by affirming the judgment" terminating the mother's parental rights. *In re C.M.S.*, 609 P.2d 240 (Mont. Sup. Ct. 1979).

A New York court, holding that Hime Y. was in danger of being neglected if she were returned to her mother, terminated the mother's parental rights. The mother had seen many psychiatrists over the years and had been hospitalized several times. The court hinted about some serious marital difficulties, but apparently considered them unimportant. The court was concerned primarily with several other issues:

1. "In view of the mother's failure to call any psychiatrist or to adduce any other evidence bearing upon her mental fitness, this Court, as a finder of fact, must draw an unfavorable inference with regard to the evidence thus withheld."

2. The psychiatrist who testified that at some future date she might be able to care for her children "could not set a date absolute when the mother might be able to care for the children."

3. The mother went to live with her boy friend (the child's father) and planned to bring Hime and an older daughter to live with her there. The boy friend had another girl friend also living there who was pregnant by him. "No mother, possessing all her mental faculties, would entertain the thought of bringing her chil-